STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL July 23, 2013	No. I13-004 (R13-008) Re: House Bill 2178 and gift clauses of the Arizona Constitution

To: The Honorable Kelli Ward
Arizona State Senator

Question Presented and Summary Answers

Does House Bill 2178 ("H.B. 2178") violate the special law and/or gift clauses of the Arizona Constitution?

H.B. 2178 is an unconstitutional special law and thus invalid because it improperly confers tax benefits on a handful of landowners while depriving similar benefits to past, present and future landowners thrust into identical circumstances.

We decline to address whether H.B. 2178 violates the gift clause because the question rests, in part, on issues of fact.

Background

Your question concerns H.B. 2178, 2012 Ariz. Sess. Laws, ch. 200, § 1, which "[f]orgives outstanding property taxes and penalties for qualified property owners in tax years 1987 through 2009, and directs the county treasurer to grant a refund for taxes paid in that time."

See Ariz. State Senate Staff, 50th Leg., 2d Reg. Sess., Fact Sheet for H.B. 2178 (Mar. 16, 2012). H.B. 2178 was signed into law on April 5, 2012.

A. The Disputed Triangle.

H.B. 2178 impacts a discrete group of private landowners who own real property in a triangular-shaped area of land (the "Disputed Triangle") located east of the Colorado River in Mohave County (the "County"), on or near the Fort Mojave Indian Reservation. The landowners acquired their property interests as successors to a 1905 conveyance (or land patent) from the federal government to the State of California. It is unclear whether the landowners reside in Arizona.

In or around 1987, the United States and the Fort Mojave Indian Tribe (the "Tribe") asserted an ownership interest in the Disputed Triangle and 47 additional parcels (the "disputed parcels") along the Colorado River. The United States argued that the Disputed Triangle attached to sections of land held by the United States in trust for the Tribe through the process of accretion, which is "the gradual, imperceptible addition to land forming the banks of a stream by the deposit of waterborne solids or by the gradual recession of water which exposes previously submerged terrain." *State v. Jacobs*, 93 Ariz. 336, 339, 380 P.2d 998, 1000 (1963).

On August 9, 1994, the United States sued the private landowners for quiet title, ejectment, and trespass damages under the accretion theory. The landowners ultimately prevailed in 2009.

B. Property Tax Assessments.

Mohave County assessed property taxes on the disputed parcels during the litigation period from 1994 to 2009, and an unknown number of private landowners continued to voluntarily pay them. Given the ownership issues, however, the County apparently deferred

collection of the taxes until the litigation concluded. Thus, an unknown number of landowners paid no taxes.

When the landowners ultimately prevailed in the lawsuit in 2009, Mohave County requested back taxes from 1994 through 2009. Some landowners expressed surprise to Mohave County officials because the County never indicated the landowners would be responsible for back taxes if they prevailed. The private landowners also raised fairness objections based on their inability to use, improve, or sell the land while embroiled in litigation.

C. H.B. 2178.

Unable to persuade Mohave County officials, the private landowners approached the Arizona Legislature for tax relief, which resulted in H.B. 2178. Signed into law on April 5, 2012, H.B. 2178 provides that:

> Property taxes and any accrued penalties due from but not paid by any qualified property owner for tax years 1987 through 2009 are forgiven and no longer due and payable. The county board of supervisors shall direct the county treasurer to strike off any forgiven taxes from the tax roll.
>
> The county board of supervisors shall direct the county treasurer to grant a refund to a qualified property owner if [t]he qualified property owner paid property taxes on qualified property during any tax year 1987 through 2009 [and t]he property taxes paid have not already been refunded.

2012 Ariz. Sess. Laws, ch. 200, § 1(A), (D). The defined terms are:

> "Qualified property" means the property that is owned by a qualified property owner and that was subject to a federal lawsuit brought by the United States of

> America for the benefit of the Fort Mojave Indian Tribe against the qualified property owner.
>
> "Qualified property owner" means a property owner who was a defendant in a federal lawsuit brought by the Unites States of America for the benefit of the Fort Mojave Indian Tribe in which the property owner owns land that is included in approximately one hundred thirty acres of land within a triangular shaped area that is east of the Colorado River and that is near the Fort Mojave Indian Tribe reservation.

Id. at § 1(E).

The legislation set a December 31, 2012 deadline for qualified owners to submit refund claims and directed "the county treasurer [to] pay the claim after it is submitted." *Id.* at § 1(B). In turn, the Mohave County treasurer is entitled to a credit with the State of Arizona "for the refunds given to qualified property owners." *Id.* at § 1(C).

According to the Senate Fact Sheet, "[t]he fiscal impact of [H.B. 2178] is not known at this time." *See* Ariz. State Senate Staff, 50th Leg., 2d Reg. Sess., Fact Sheet for H.B. 2178 (Mar. 16, 2012).

D. H.B. 2177.

Of particular import here, H.B. 2178 was first introduced in tandem with a second far broader bill—H.B. 2177—that would have authorized all taxpayers to petition state and local agencies to waive any property taxes that become due on land which "is the subject of an action *in rem* filed by any jurisdiction of federal, state, local or tribal government, if the action continues for at least twelve months and if the action includes a determination of the ownership status of the property." H.B. 2177, 50th Leg., 2d Reg. Sess. (Ariz. 2012).

Representative Jeff Dial introduced and sponsored both H.B. 2177 and H.B. 2178. He explained the difference between the bills as follows: "I always felt that if someone doesn't have use of the property because [a] government entity comes along and ties you up in court for 24 years or a significant period of time, then I really think then we shouldn't really be asking people to pay property taxes on a property they're not getting the use of so that's what these bills go towards. So one bill goes specifically towards resolving [the Disputed Triangle] case and another one as I was asked in this body for other people this happens to versus us going out and dealing with each case-by-case basis. This is trying to create an umbrella to deal with this issue." *See* Minutes of Comm. On House Ways and Means (Feb. 6, 2012) (statement of Rep. Jeff Dial). H.B. 2177 was ultimately abandoned and never submitted to a vote.

Analysis

All legislative enactments are presumed constitutional, *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 204, ¶ 9, 972 P.2d 179, 188 (1999) ("We assume, as always, that legislative enactments are constitutional. We do not lightly conclude to the contrary."), and construed, when possible, to have a reasonable and constitutional meaning, *State v. Arnett*, 119 Ariz. 38, 48, 579 P.2d 542, 552 (1978). Moreover, because the Attorney General is duty-bound to uphold and defend state laws, he "will not opine that a statute is unconstitutional unless it is patently so." Ariz. Att'y Gen. Op. I83-069; *cf. State v. Ramos*, 133 Ariz. 4, 6, 648 P.2d 119, 121 (1982) ("An act of the legislature is presumed constitutional, and where there is a reasonable, even though debatable, basis for enactment of the statute, the act will be upheld unless it is clearly unconstitutional.").

1. Special Law Prohibition

The Arizona Constitution directs that "[n]o local or special law shall be enacted in any of

the following situations: (9) assessment and collection of taxes, (13) granting to any corporation, association, or individual, any special or exclusive privileges, immunities or franchises, and (18) relinquishing any indebtedness, liability, or obligation to this state." ARIZ. CONST. art. IV, § 19. This prohibition is designed "to prevent the legislature from providing benefits or favors to certain groups or localities." *State Compensation Fund v. Symington*, 174 Ariz. 188, 192, 848 P.2d 273, 277 (1993). It applies to tax exemption laws. *State v. Levy's*, 119 Ariz. 191, 192, 580 P.2d 329, 330 (1978).

A statute is an unconstitutional special law if it fails to meet any of three independent requirements: (1) the classification of beneficiaries in the statute must have a rational relationship to a legitimate legislative objective; (2) the classification must encompass all members of the relevant class; and (3) the class must be elastic, allowing members to come and go as circumstances warrant. *Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143, 149, 800 P.2d 1251, 1257 (1990) (deannexation statute was invalid as special law for lack of generality and elasticity where the legislature restricted statute to a closed class of twelve cities).

a. Rational Relationship to Legitimate Goal

We first examine whether the classification scheme in H.B. 2178 bears a rational relationship to a legitimate governmental objective. *Arizona Downs v. Arizona Horsemen's Found.*, 130 Ariz. 550, 555, 637 P.2d 1053, 1058 (1981) (statute that gave preference for horse racing permit to past holders was rationally related to encouraging investment into horse racing business by assuring continuity and predictability of events). The legislature has broad discretion to create property tax classifications and Arizona courts defer to legislative judgment on the reasonableness of such classifications unless palpably arbitrary. *Tucson Elec. Power Co. v. Apache County*, 185 Ariz. 5, 13, 912 P.2d 9, 17 (App. 1995) ("The judgment of the legislature

that a statutory classification is reasonable controls the courts unless palpably arbitrary."); *see also generally America West Airlines v. Department of Revenue*, 179 Ariz. 528, 535, 880 P.2d 1074, 1081 (1994) (affirming legislature's broad discretion in property tax classifications).

H.B. 2178 conceivably advances three legitimate governmental objectives. First, its sponsors intended to correct inequities that arise when private landowners are required to pay taxes on land they cannot use or enjoy due to pending government litigation to secure title in the same land. *See* Minutes of Comm. On House Ways and Means (Feb. 6, 2012) (statement of Rep. Jeff Dial). It thus seeks to promote fairness in the realm of property tax burdens and obligations. *Apache County v. Atchison, Topeka & Santa Fe Ry. Co.*, 106 Ariz. 356, 363, 476 P.2d 657, 664 (1970) ("One purpose of a property tax classification scheme is to raise those revenues necessarily borne by property taxes. It has been recognized that those groups specially benefiting from or specially burdening society may be required to pay additional taxes."). Secondly, while less clear, the legislature might have passed H.B. 2178 to incent and foster economic development in the affected areas. *Cutter Aviation, Inc. v. Arizona Dept. of Revenue*, 191 Ariz. 485, 958 P.2d 1 (App. 1997) (recognizing rational basis for tax relief legislation intended to foster economic development). And last, the legislature may have sought to ensure future tax revenues from landowners about to lose their land for nonpayment of taxes. *Cf. Maricopa County v. State (Sherwood)*, 187 Ariz. 275, 280, 928 P.2d 699, 704 (App. 1996) (raising prospective tax revenues as public purpose in gift clause context).

Even so, we discern no rational relationship between such legitimate objectives and the defined class of beneficiaries in H.B. 2178 who actually obtain tax relief. The law forgives unpaid taxes and promises tax refunds only to "qualified property owners," which the legislature defined narrowly to include a handful of taxpayers who both own land in the Disputed Triangle

and were named as defendants in *United States v. Aria, et. al.*, No. 94-cv-01624 (D. Ariz.). But if the Legislature intended H.B. 2178 as relief for landowners who are expected to pay taxes on land rendered worthless by overreaching government litigation, then the tax relief in H.B. 2178 should be available to all private landowners thrust into an identical predicament. *Republic*, 166 Ariz. at 149, 800 P.2d at 1257 ("The legislature may classify, but it cannot make a classification based on a decision that a law should apply to a particular individual or group. Rather, the legislature must enact laws that apply to all individuals who may benefit from its attempt to remedy a particular evil."). It is "palpably arbitrary" to bestow special tax treatment on a discrete group of landowners in the Disputed Triangle while continuing to impose standard taxes on similarly situated landowners. *Tucson Elec. Power*, 185 Ariz. at 15, 912 P.2d at 19 (finding special treatment of particular taxpayers palpably arbitrary).

b. All-Encompassing Class and Elasticity

For analogous reasons, H.B. 2178 fails to meet the second and third constitutional requirements; it neither encompasses all members of the relevant class, nor is pliable enough to accommodate additional members. *Levy's*, 119 Ariz. at 192-93, 580 P.2d at 330-31 (tax exemption that sought to mitigate adverse economic impact upon retailer who faced border competition was invalid as a special law because it failed to treat all similarly situated retailers in the same fashion and instead defined a class upon arbitrary geographic lines).

H.B. 2178 improperly affords special tax treatment to a handful of landowners while ignoring all other landowners thrust into identical circumstances. *Republic*, 166 Ariz. at 151, 800 P.2d at 1259 ("The statute was enacted in response to the abuse of the municipalities' power to strip annex. On that basis, the class affected by the statute should include all cities where annexation abuses may have occurred. Because the statute applies to only 12 cities within

Maricopa County, it does not apply uniformly to all members of the class. Instead, the statute confers a benefit only on part of the class while immunizing larger cities in Maricopa County and all other similarly situated cities in other counties."). Indeed, apparently recognizing this deficiency, Representative Dial first introduced H.B. 2178 in tandem with H.B. 2177. In remarks to a House Committee, he described H.B. 2177 as the "umbrella" to protect all landowners from identical misfortune while explaining that H.B. 2178 "goes specifically towards resolving this [Disputed Triangle] case." *See* Minutes of Comm. On House Ways and Means (Feb. 6, 2012) (statement of Rep. Jeff Dial).

Next, H.B. 2178 is not sufficiently elastic to pass constitutional muster. *Id.* at 150, 800 P.2d at 1258 ("A statute is special or local if it is worded such that its scope is limited to a particular case and it 'looks to no broader application in the future.'") (quoting *Arizona Downs*, 130 Ariz. at 558, 637 P.2d at 1061). H.B. 2178 is not worded to reach landowners who confront identical circumstances in the future; rather, it provides relief to a finite group of landowners over a discrete period of twenty-two years. *Id.* at 151, 800 P.2d at 1259 ("Moreover, the statute's focus, limited to a particular census for only 13 months, prevents any municipality from either coming within or exiting from its operation in the future. Because a general law would have provided a remedy to individuals in all areas annexed by large or small cities within the state, as indicated by the original bill, the statute's limited application violates the special law prohibition.").

H.B. 2178 is an unconstitutional special law and thus invalid because it arbitrarily confers tax benefits on a clique of landowners while excluding past, present and future landowners thrust into the same predicament.

2. Gift Clause

The Arizona Constitution prohibits the expenditure or use of public monies for private purposes under the gift clause, ARIZ. CONST. art. IX, § 7, which is designed to eliminate government favoritism and prevent governments from depleting public resources in favor of special interests. *See Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349, 687 P.2d 354, 357 (1984) ("The constitutional prohibition was intended to prevent government entities from depleting the public treasury by giving advantages to special interests or by engaging in non-public enterprises."); John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L. J. 1, 96 (1988). The clause provides, in relevant part, that "[n]either the state, nor any county, city, town, municipality, or other subdivision of the State shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." ARIZ. CONST. art. IX, § 7. It has been applied to tax forgiveness and tax rebate legislation. *Sherwood*, 187 Ariz. at 280, 928 P.2d at 704.

A government expenditure violates the gift clause unless it meets two independent requirements: (1) it must have a public purpose, and (2) the government must, in return for the expenditure, receive consideration that "is not so inequitable and unreasonable that it amounts to an abuse of discretion, thus providing a subsidy to the private entity." *Wistuber*, 141 Ariz. at 349, 687 P.2d at 357 (internal quotations and citations omitted).

In conducting the analysis, Arizona courts examine all relevant facts to determine the "reality of the transaction both in terms of purpose and consideration." *Id.* at 348-349, 687 P.2d at 356-357. And, similar to the special law inquiry, the Court has directed that substantial deference be given to the judgment of elected officials. *Turken v. Gordon*, 223 Ariz. 342, 349, 224 P.3d 158, 165 (2010) ("In taking a broad view of permissible public purposes under the Gift Clause, we have repeatedly emphasized that the primary determination of whether a specific

purpose constitutes a 'public purpose' is assigned to the political branches of government, which are directly accountable to the public. We find a public purpose absent only in those rare cases in which the governmental body's discretion has been 'unquestionably abused.'") (internal citations omitted). Notwithstanding such deference, Arizona courts "must be independently satisfied that the two elements of a valid dispensation have been shown," *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 367, 837 P.2d 158, 169 (App. 1991), rather than "merely rubber-stamp[ing] the legislature's decision." *Id.* at 369, 837 P.2d at 171.

The public expenditure must serve a public purpose. *Sherwood*, 187 Ariz. at 280, 928 P.2d at 704. The Court has recognized that "public purpose" is incapable of exact definition and changes in meaning to meet new developments and conditions. *Id.* A public purpose has been found where benefits are conferred on particular persons or organizations. *See, e.g.*, *Humphrey v. City of Phoenix*, 55 Ariz. 374, 387, 102 P.2d 82, 87 (1940) (slum clearance program found to serve interest of general public even though effect is felt by a given class more than the community at large).

Turning to the instant expenditure, H.B. 2178 affords tax relief to a discrete group over a finite period. The group is comprised of landowners sued by the federal government in 1994 for quiet title and related claims. The finite period spans from the point at which the federal government first contested their ownership in 1987 until the landowners prevailed in 2009. Among the public purposes that either have been or might be offered for the expenditure are: (1) moral justification, (2) estoppel, and (3) economic justification.

The landowners have largely cited fairness considerations as the public purpose for H.B. 2178; that is, tax relief was appropriate because the landowners had no use or enjoyment of the land while embroiled in the title dispute. We are unable to find support for the argument. While

the Arizona Supreme Court recognized a moral consideration theory in *Udall v. State Loan Board*, 35 Ariz. 1, 11, 273 P. 721, 724 (1929), that decision is inapplicable here. There, the Court examined and upheld legislation under the gift clause that forgave certain debts to the state because those debts had been unreasonably expanded through the incompetence of state engineers. *Id.* Here, the landowners blame the federal government for impairing their property rights through litigation rather than state government. Moral consideration might support federal legislation under this theory, but not state legislation.

Although undefined and unclear, the landowners have also mentioned an estoppel theory based on alleged promises from Mohave County that the landowners would not be required to pay property taxes while the ownership dispute remained unresolved. With the limited information provided, this argument is not persuasive. Even accepting the alleged statements as fact, Mohave County never promised that back taxes would not be collected after the ownership dispute had been resolved.

An economic public purpose is also conceivable; that H.B. 2178 prevented an unknown number of landowners from losing their land, which, in turn, protected the employment and commodities derived from the land while ensuring a future tax revenue stream. *Pimalco, Inc. v. Maricopa County*, 937 P.2d 1198, 1201, 188 Ariz. 550, 553 (App. 1997) ("These attempts reflect a desire to prevent the possessory interest tax from deterring non-Indian commercial development on Indian lands and a desire to further the public benefit of an expanded employment base available to all Arizonans."). Without particularized information about such public benefits, however, we cannot assess their existence or adequacy. *Hassell*, 172 Ariz. at 369-70, 837 P.2d at 171-72 (rejecting assorted theories of public benefit because the court "cannot judge their adequacy for a reason that brings us to a central defect of H.B. 2017. [T]he

legislature acted without particularized information, and established no mechanism to provide particularized information, to support even an estimate of the value of those claims.").

Even assuming a public benefit, H.B. 2178 must still meet the consideration requirement, which is a question of fact, *Sherwood*, 187 Ariz. at 281, 928 P.2d at 705 ("The second prong, whether the exchange of tax money for the public benefit is disproportionate, is as a question of fact."), and thus outside the Attorney General's statutory authorization to offer opinions. ARIZ. REV. STAT. § 41-193(A)(7); Ariz. Op. Atty. Gen. No. I80-231; *see also* 1988 Ariz. Op. Atty. Gen. 97 ("Since the existence of the requisite intent to establish district residency is primarily a factual determination, we express no opinion with respect to this matter.").

Conclusion

H.B. 2178 is an unconstitutional special law and thus invalid because it arbitrarily confers tax benefits on a handful of landowners while depriving similar benefits to past, present and future landowners thrust into identical circumstances. Although H.B. 2178 raises additional concerns under the gift clause, we cannot provide an opinion on that issue because it rests, in part, on questions of fact.

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